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No. 99-2085

IN THE

Supreme Court of the United States

ERNESTO ALONSO MEJIA RODRIGUEZ,

Petitioner,

v.

JANET RENO, Attorney General of the United States and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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REASONS FOR GRANTING THE WRIT

Mr. Mejia is gratified by the government's recognition that the second question presented, arising from the denial of relief to Mr. Mejia based on his Fifth Amendment claim of denial of effective assistance of counsel in the immigration proceedings, should be heard by this Court. *See* Brief for the Respondents (Respondents' Brief) at 11-19. The decision in *Castillo-Perez v. INS*, 212 F.3d 518 (9th Cir. 2000), cited by the government, Respondents' Brief at 12, serves only to sharpen the existing conflict among the circuits and to demonstrate the need for a conclusive determination on the question whether an alien who has been denied effective assistance of counsel in connection with an application for discretionary relief from deportation can bring a claim under the Fifth Amendment.[1] Only the Eleventh Circuit expressly has held that no claim of ineffective assistance of counsel can arise under such circumstances. See Petition for Writ of Certiorari (Petition) at 22-29.

The government thus correctly acknowledges the irreconcilable conflict among the circuits on this question. The government's suggestion, however, that the matter should be remanded to the Eleventh Circuit, for further remand to the Board of Immigration Appeals (BIA), Respondents' Brief at 14-15, however, is misdirected.[2] As is noted in the Petition, it is

1. In *Castillo-Perez*, the court was fully cognizant of the discretionary nature of a decision by an immigration judge or the Board of Immigration Appeals on suspension of deportation. 212 F.3d at 523-24. The court nonetheless found "a clear and obvious case of ineffective assistance of counsel" based on the lawyer's failure timely to seek a suspension of deportation on behalf of his client. *Id.* at 526-27. The court further held that the alien had made the requisite "showing of prejudice" because the performance of his counsel had been "so inadequate that it may have affected the outcome of the proceedings." *Id.* at 527 n.2 (citation omitted).

2. The government cites to a BIA order in the pending case of *In re Cruz*, No. A73 419 214 (September 15, 2000). Respondents' Brief

(Cont'd)

not for the BIA to address purely constitutional issues. *See* Petition at 21. This is not an instance in which this Court (or any federal appellate court) requires guidance from a federal agency. *See, e.g., Christensen v. Harris County,* 529 U.S. 576 (2000). Rather, the *purely constitutional question* whether the Fifth Amendment protects an alien against ineffective assistance of counsel arising from failures and omissions by counsel in seeking discretionary relief from deportation is *squarely presented* for this Court's review in this case.[3]

(Cont'd)
at 14. The Executive Office of Immigration Review has advised the undersigned that this order is not available for release absent a Freedom of Information Act request. Mr. Mejia has submitted his request and has asked for an expedited response; the referenced order has not been received as of the filing of this reply.

3. The government suggests that Mr. Mejia's "procedural default" in not raising his claim of ineffective assistance on review of the immigration judge's deportation order serves to warrant further proceedings before the BIA, rather than plenary review at the present time. Respondents' Brief at 13-14. The Eleventh Circuit, however, as the government acknowledges, *id.* at 14 n.4, *addressed the merits* of Mr. Mejia's claim of ineffective assistance of counsel, holding that "an attorney's deficient representation does not deprive an alien of due process if the deficient representation merely prevents the alien from being eligible for suspension of deportation," Appendix A at 20a, thus making it entirely appropriate for this Court to do the same. *E.g., City of Oklahoma City v. Tuttle,* 471 U.S. 808, 815-16 (1985). No conceivable interest would be served by compelling Mr. Mejia — whose appeal to the BIA from the deportation order was handled *by the same attorneys* who represented him in the deportation proceedings — to proceed further before the BIA when the Eleventh Circuit, before which court the BIA's decision would be subject to review, has announced that *no* claim of ineffective assistance will lie in the case. Notably, the government does not fault Mr. Mejia for not performing the impossible feat of having the lawyers whose representation was defective raise their own ineffective representation on review before the BIA in order to secure judicial review.

Moreover, the very limited power of the BIA to address constitutional issues, Petition at 21, brings into focus Mr. Mejia's *Sixth Amendment* claim — the claim that was adjudicated in his favor by the Florida state courts and which forms the cornerstone of the constitutional violation that Mr. Mejia sought to press before the district court on habeas corpus. The government suggests that Mr. Mejia's first question presented for review should not be considered by the Court because a ruling on the question "is entirely unnecessary to [a] resolution of petitioner's case." Respondents' Brief at 10. Unless the government is suggesting that the BIA has jurisdiction to consider Mr. Mejia's Sixth Amendment claim, this is an inaccurate statement.

As set forth in the Petition, the Florida courts ruled that Mr. Mejia was denied effective assistance of counsel in the state plea proceedings because his counsel (as well as the state judge and prosecutor) affirmatively misled him as to the immigration consequences of entering a no contest plea. Petition at 18-22. As the government essentially concedes, Respondents' Brief at 11, the Eleventh Circuit refused to allow Mr. Mejia to pursue the Sixth Amendment claim on habeas corpus, apparently believing that its rejection of Mr. Mejia's *Fifth Amendment* claim fully addressed the ineffectiveness claims. Appendix A at 11a. While recognizing that a grant of certiorari is appropriate as to the Eleventh Circuit's Fifth Amendment ruling, the government similarly declines to address Mr. Mejia's Sixth Amendment claim here.

The Sixth Amendment claim arises *solely from the ineffective assistance provided to Mr. Mejia in the state trial proceedings*. The Florida court has adjudicated that claim and ruled that Mr. Mejia was indeed denied effective assistance of counsel. As the record before this Court reflects, Mr. Mejia was represented in the immigration proceedings

by the same attorney who had represented him in the original plea proceedings (along with a second lawyer). The undisputed facts show that Mr. Mejia's lawyers believed that the plea arrangements in state court prohibited the INS from using the withhold of adjudication entered by the state court against Mr. Mejia in the immigration proceedings, either as a basis for deportation or for pretermitting an application for suspension of deportation. (LA:95, 107-08, 126-27, 230-36). The state court "conviction," however, indeed precluded Mr. Mejia from seeking a suspension of deportation. Appendix F; Appendix G.

Mr. Mejia's *Fifth Amendment* claim of ineffective assistance of counsel is thus inextricably intertwined with the *Sixth Amendment* violation, the existence of which is no longer subject to question, in the state-court proceedings. The government's attempt to sever the two claims, and thereby to assert that the Court need not address the availability of habeas corpus following the enactment of the IIRIRA, should not succeed. Mr. Mejia's Fifth Amendment claim, which claim the government acknowledges should be subject to further review, cannot be addressed in a vacuum, *i.e.*, without consideration of the pre-existing and causative Sixth Amendment deprivation in the state courts. Because the BIA is not an Article III court that may consider the constitutional taint of a Sixth Amendment violation in the state courts on an application for writ of habeas corpus, Mr. Mejia will be afforded *no judicial review* of his Sixth Amendment claim under the course proposed by the government.

It is certainly true, as the government notes, that this Court has declined to consider on certiorari any number of decisions of the court of appeals addressing the availability of habeas corpus under the "transitional" provisions of Section 309(c)(4) of the IIRIRA. *See* Petition at 10-11;

Respondents' Brief at 10-11. The government leaves unexplained, however, why those denials should cut against a grant of certiorari where, as the government at least silently concedes, a direct conflict exists among the Circuits on the question whether habeas corpus survives the IIRIRA — and where Mr. Mejia will suffer the undeniable loss of *all judicial review* of his Sixth Amendment-derived habeas corpus claim if the Eleventh Circuit's decision on this point goes unreviewed.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition should be granted.

Respectfully submitted,

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